No. 05-409

IN THE

Supreme Court of the United States

CARL KIRCHER, ET AL.,

Petitioners,

v.

PUTNAM FUNDS TRUST, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the court of appeals correctly exercised appellate jurisdiction to review the district court's determination that petitioners' claims are not precluded by the Securities Litigation Uniform Standards Act of 1998 (SLUSA).

II. Whether the court of appeals correctly determined that petitioners' claims allege misconduct "in connection with" the purchase or sale of securities, and thus are precluded by SLUSA.

RULE 29.6 STATEMENT

Respondent Artisan Partners Limited Partnership has no parent corporation, and no publicly held company owns 10% or more of its stock. This respondent is a limited partnership, the general partner of which is Artisan Investment Corporation, which has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Artisan Funds, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Columbia Wanger Asset Management, LP has no parent corporation, and no publicly held company owns 10% or more of its stock. This respondent is a limited partnership, the general partner of which is CWAM Acquisition GP, Inc., which is a wholly owned subsidiary of Columbia Management Group, Inc., which in turn is a wholly owned subsidiary of Fleet National Bank, which in turn is a subsidiary of Bank of America Corporation, a publicly traded company.

Respondent Columbia Acorn Trust has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Deutsche Investment Management Americas Inc. is a wholly owned subsidiary of Deutsche Bank Americas Holding Corp., which is a wholly owned subsidiary of Taunus Corporation, which is a wholly owned subsidiary of Deutsche Bank AG, a publicly traded company that owns 10% or more of respondent's stock. No other publicly held company owns 10% or more of its stock.

Respondent Janus Capital Management LLC is a wholly owned subsidiary of Janus Capital Group Inc., a publicly traded company that owns 10% or more of respondent's stock. No other publicly held company owns 10% or more of its stock.

Respondent Janus Investment Fund has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Pacific Life Insurance Company is a wholly owned subsidiary of Pacific Life Corporation, a private stock holding company. No publicly held company owns 10% or more of respondent's stock.

Respondent Putnam Investment Management, LLC is an indirect subsidiary of Marsh & McLennan Companies, Inc., a publicly traded company that owns 10% or more of respondent's stock. No other publicly held company owns 10% or more of its stock.

Respondents Putnam Funds Trust, Putnam International Equity Fund, and Putnam Investment Funds have no parent corporation and no publicly held company owns 10% or more of their stock.

Respondent Scudder International Fund, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Van Kampen Investment Advisory Corporation merged on November 30, 2003, into Van Kampen Asset Management, which is a wholly owned subsidiary of Van Kampen Investments, Inc., which is a wholly owned subsidiary of MSAM Holding II Inc., which is a wholly owned subsidiary of Morgan Stanley, a publicly traded company that owns 10% or more of respondent's stock. No other publicly held company owns 10% or more of its stock.

Respondent Van Kampen Series Fund, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

STATEMENT 1

DISCUSSION 9

I. The Seventh Circuit's Exercise Of Appellate Jurisdiction Does Not Warrant Plenary Review 10

A. The Asserted Conflict Need Not Be Resolved At This Time 11

B. The Decision Below Is Correct 15

II. The Seventh Circuit's Construction Of SLUSA Does Not Warrant Plenary Review 18

A. The Asserted Conflict Will Be Resolved In *Dabit* 18

B. The Decision Below Is Correct 21

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Abada v. *Charles Schwab & Co.*,
300 F.3d 1112 (9th Cir. 2002) 6, 10

In re Amoco Petroleum Additives Co.,
964 F.2d 706 (7th Cir. 1992) 6

Ariail Drug Co. v. *Recomm Int'l Display*,
122 F.3d 930 (11th Cir. 1997) 12

Bell v. *Hood*,
327 U.S. 678 (1946) 6, 17

Blue Chip Stamps v. *Manor Drug Stores*,
421 U.S. 723 (1975) ..... *passim*

Bradfisch v. *Templeton Funds, Inc.*,
No. 03-CV-0760-MJR
(S.D. Ill. Jan. 23, 2004) 4

Carnegie-Mellon Univ. v. *Cohill*,
484 U.S. 343 (1988) 5

Dabit v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*,
395 F.3d 25 (2d Cir. 2005),
cert. granted, No. 04-1371 ..... *passim*

Disher v. *Citigroup Global Mkts., Inc.*,
419 F.3d 649 (7th Cir. 2005) 11

Dudek v. *Prudential Secs., Inc.*,
295 F.3d 875 (8th Cir. 2002) 15

Falkowski v. *Imation Corp.*,
309 F.3d 1123 (9th Cir. 2002) 7, 8

Green v. *Ameritrade, Inc.*,
279 F.3d 590 (8th Cir. 2002) 7, 8

Gutierrez de Martinez v. *Lamagno*,
515 U.S. 417 (1995) 17

Holmes v. *SIPC*,
503 U.S. 258 (1992) 9, 21

Izumi Seimitsu Kogyo Kabashiki Kaisha v.
United States Philips Corp.,
510 U.S. 27 (1993) 20

Jamison v. *Wiley*,
14 F.3d 222 (4th Cir. 1994) 17

In re Janus Mut. Funds Inv. Litig.,
310 F. Supp. 2d 1359 (J.P.M.L. 2004) 4

Jefferson County v. *Acker*,
527 U.S. 423 (1999) 16

Kontrick v. *Ryan*,
540 U.S. 443 (2004) 6, 10, 11

McCray v. *New York*,
461 U.S. 961 (1983) 13

In re Mut. Funds Inv. Litig.,
384 F. Supp. 2d 845 (D. Md. 2005) 5

Oklahoma Tax Comm'n v. *Graham*,
489 U.S. 838 (1989) 16

Osborn v. *Bank of United States*,
22 U.S. (9 Wheat.) 738 (1824) 15

Quackenbush v. *Allstate Ins. Co.*,
517 U.S. 706 (1996) 5, 6

Riley v. *Merrill Lynch, Pierce, Fenner*
& Smith, Inc.,
292 F.3d 1334 (11th Cir. 2002) 7, 8

Rowinski v. *Salomon Smith Barney Inc.*,
398 F.3d 294 (3d Cir. 2005) 7, 13

Scarborough v. *Principi*,
541 U.S. 401 (2004) 6, 10, 11

SEC v. *Zandford*,
535 U.S. 813 (2002) 9, 20, 21

Spielman v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*,
332 F.3d 116 (2d Cir. 2003) 6, 10

Superintendent of Ins. v. *Bankers Life & Cas. Co.*, 404 U.S. 6 (1971) 9

Taylor v. *Freeland & Kronz*,
503 U.S. 638 (1992) 20

Thermtron Prods., Inc. v. *Hermansdorfer*,
423 U.S. 336 (1976) 5

Things Remembered, Inc. v. *Petrarca*,
516 U.S. 124 (1995) 5, 6

United Investors Life Ins. Co. v. *Waddell & Reed, Inc.*,
360 F.3d 960 (9th Cir. 2004) 6, 10

United States v. *Naftalin*,
441 U.S. 768 (1979) 9

United States v. *O'Hagan*,
521 U.S. 642 (1997) 9, 21

Venezia v. *Robinson*,
16 F.3d 209 (7th Cir. 1994) 16

Verlinden B.V. v. *Central Bank of Nig.*,
461 U.S. 480 (1983) 15

Waco v. *United States Fid. & Guar. Co.*,
293 U.S. 140 (1934) 17

Williams v. *AFC Enters., Inc.*,
389 F.3d 1185 (11th Cir. 2004) 12

Willingham v. *Morgan*,
395 U.S. 402 (1969) 16, 17

Statutes and Regulation

Class Action Fairness Act of 2005, § 5(a),
Pub. L. No. 109-2, 119 Stat. 12
(codified at 28 U.S.C. § 1453(c)(1)) 13

Investment Company Act of 1940, § 2(a)(39),
Pub. L. No. 76-768, 54 Stat. 796
(as amended) (codified at 15 U.S.C.
§ 80a-2(a)(41)(B)(ii)) 3

Judicial Code & Judiciary, Pub. L. No. 80-773
(1948), 62 Stat. 938-39 (as amended):

28 U.S.C. § 1442 16

28 U.S.C. § 1442(a)(1) 16

28 U.S.C. § 1447(c) 5, 11

28 U.S.C. § 1447(d) 5, 12, 15, 17

Securities Act of 1933, Tit. I § 22,
Pub. L. No. 73-22, 48 Stat. 86-87
(as amended) (codified at 15 U.S.C.
§ 77v(a)) 12

Securities Litig. Uniform Standards Act of 1998,
Tit. I § 101, Pub. L. No. 105-353, 112 Stat.
3227-33:

15 U.S.C. § 77p(b) 4, 12

15 U.S.C. § 77p(c) 15

15 U.S.C. § 77p(d)(4) 4

15 U.S.C. § 78bb(f)(1) 4, 12

15 U.S.C. § 78bb(f)(2) 15, 16

15 U.S.C. § 78bb(f)(3)(D) 4

17 C.F.R. § 270.2a-4(a) 3

Other Authorities

SEC Div. of Inv. Mgmt., *Letter to the ICI Regarding Valuation Issues*, 2001 SEC No-Act. LEXIS 543 (Apr. 30, 2001) 2, 3

SEC Rel. No. 33-7512, 63 Fed. Reg. 13,916 (Mar. 23, 1998) 3

SEC Rel. No. IC-14244, 49 Fed. Reg. 46,558 (Nov. 27, 1984) 3

Robert L. Stern et al., *Supreme Court Practice* § 4.4 (8th ed. 2002) 11

BRIEF IN OPPOSITION

Respondents respectfully submit that the petition for a writ of certiorari should be denied.

STATEMENT

After removal, the district court held that petitioners' state-law claims are not precluded by the Securities Litigation Uniform Standards Act of 1998 (SLUSA). The court of appeals reversed, directing the dismissal of petitioners' claims pursuant to SLUSA.

1. Respondents are either investment companies (commonly known as mutual funds) or entities that provide advisory services to mutual funds (investment advisers).[1] They are registered with, and regulated by, the Securities and Exchange Commission (SEC) pursuant to the Investment Company Act of 1940 or the Investment Advisers Act of 1940. Their securities (both common stock and mutual fund shares) are subject to the Securities Act of 1933, and their operations are governed by the Securities Exchange Act of 1934. *See* Pet. App. 10a.

Petitioners are individuals who allegedly purchased shares in mutual funds offered or advised by respondents. *See* Resp. C.A. Br. 1 n.1 (pairing particular petitioners and respondents). They brought putative class actions in Illinois state court on behalf of "all persons in the United States who have held shares of [the fund] for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange." Pet. 8 (quoting complaints).

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[1] One of the respondents is an insurance company that allows mutual fund investments through its variable annuity products. This distinction has no bearing on the questions presented.

Petitioners allege that respondents "set the fund share price (NAV) once every business day at the close of trading on the New York Stock Exchange at 4:00 p.m. Eastern Time," and that, to do so, respondents "use the last trade price in the home market of each of the securities in [their] portfolio[s]." App., *infra*, 5a.[2] These allegations reflect the requirements of the Investment Company Act of 1940 (ICA) and associated regulations, pursuant to which mutual funds typically "calculate their NAVs once each day at or near the close of the major U.S. securities exchanges and markets (usually 4:00 p.m., Eastern Time . . .)" and "generally calculate their NAVs by using the closing prices of portfolio securities on the exchange or market (whether foreign or domestic) on which the securities principally trade." SEC Div. of Inv. Mgmt., *Letter to the ICI Regarding Valuation Issues*, 2001 SEC No-Act. LEXIS 543, at *2 (Apr. 30, 2001).

Petitioners further allege that a "significant portion of the securities in [respondents'] portfolios are foreign securities" that trade on exchanges "located in time zones that are five hours to fifteen hours ahead of Eastern Standard Time." App., *infra*, 5a. As a result of this time-zone difference, petitioners allege that "the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time [respondents] set their fund NAV." *Ibid.* Petitioners complain that despite "knowledge of . . . the stale price[s] of the foreign securities in [their] underlying portfolio[s]," respondents "do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day." *Id.* at 5a-6a.

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[2] Petitioners have included only limited excerpts of their complaints with their petition. *See* Pet. App. 66a-117a. For convenience, respondents include the complete text of a representative complaint (*Potter*) in the Appendix to this brief. *See also* C.A. App. 135a-319a (complete text of all complaints).

The ICA, which governs the NAV calculations for these nationally traded securities, does not require (or even permit) funds to estimate the "fair value"—*i.e.*, a valuation that differs from the closing price—of portfolio securities unless market quotations are not readily available. 15 U.S.C. § 80a-2(a)(41)(B)(ii); 17 C.F.R. § 270.2a-4(a). When market quotations are readily available, "funds are not permitted to ignore these quotations and fair value price the securities" because to do so "would not be consistent with a fund's obligation under the 1940 Act and could result in an incorrect NAV." 2001 SEC No-Act. LEXIS 543, at *19-*20; *see also* SEC Rel. No. 33-7512, 63 Fed. Reg. 13,916, 13,933 (Mar. 23, 1998); SEC Rel. No. IC-14244, 49 Fed. Reg. 46,558, 46,559 n.7 (Nov. 27, 1984).

Notwithstanding the clear requirements of federal law, petitioners charge that "[b]y failing to make daily adjustments . . . and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, [respondents] have exposed long term shareholders to market timing traders who regularly purchase and redeem [mutual fund] shares as part of a profitable trading strategy." App., *infra*, 9a. Petitioners claim that respondents urged them to invest for the long term, but failed to provide complete and accurate information regarding NAV pricing, the opportunity for market-timing and other arbitrage, and the impact of such trades on other investors. *Id.* at 4a, 9a-12a. They contend that the "excess profits that are obtained by market timing traders' taking advantage of the stale pricing of [mutual fund] shares come at the expense of fellow shareholders." *Id.* at 10a. Petitioners complain that, by allegedly facilitating market-timing trading in this fashion, respondents breached duties purportedly owed to shareholders under state common law. *Id.* at 17a-18a. Petitioners sought damages (including punitive damages), interest, and attorneys' fees. *Id.* at 19a-20a.

2. Respondents removed the cases to federal court on the ground, *inter alia*, that petitioners' claims are governed by SLUSA, which precludes state-law class actions that allege specified misconduct—a material misstatement or omis-

sion, or the use of a manipulative or deceptive device—"in connection with" the purchase or sale of securities. *See* 15 U.S.C. §§ 77p(b) & 78bb(f)(1). Petitioners' sole objection to removal (and dismissal) under SLUSA was that the "in connection with" requirement was not met because they ostensibly were mere "holders," rather than purchasers or sellers, of mutual fund shares. Pet. App. 6a.

In a series of nearly identical orders, the district court ruled that SLUSA's "in connection with" requirement was not met in these cases because "[t]here is no claim asserted by a purchaser or seller; the claims are brought by those who *held* shares." Pet. App. 30a. The court concluded that "[t]hese claims are not actionable under [§ 10(b) of the Securities Exchange Act of 1934], and they are not removable under SLUSA." *Ibid.* (citing *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975)); *see also*, *e.g.*, Pet. App. 61a (because petitioner "brings dilution claims as a *holder* of securities" and "does not assert any claim as a *purchaser* or *seller*," his "state law claims are not cognizable under the 1934 Act, and SLUSA does not preempt them"). The same reasoning was adopted in each of these cases. *Id.* at 26a-27a; 39a-40a; 43a-45a; 50a-51a; 56a-57a; 61a; *see also Bradfisch* v. *Templeton Funds, Inc.*, No. 03-CV-0760-MJR (S.D. Ill. Jan. 23, 2004) (C.A. App. 328a-335a).

Having rejected respondents' federal defense on the merits, the district court remanded the cases to state court as required by SLUSA. 15 U.S.C. §§ 77p(d)(4) & 78bb(f)(3)(D) ("if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court").[3]

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[3] More than 400 lawsuits alleging market timing in various mutual funds, including respondents' funds, have been transferred for coordinated pretrial proceedings in the District of Maryland. *See In re Janus Mut. Funds Inv. Litig.*, 310 F. Supp. 2d 1359 (J.P.M.L. 2004). That court recently held that

[Footnote continued on next page]

3. Respondents appealed the rejection of their SLUSA-preclusion defense to the Seventh Circuit. That court ultimately consolidated the cases under a single caption and reversed the district court's ruling on SLUSA.

a. The court of appeals (*Easterbrook*, Evans and Williams, JJ.) first determined that it had jurisdiction to consider respondents' appeal. Pet. App. 10a-17a. The court recognized that 28 U.S.C. § 1447(d) precludes appellate review of remand orders that are based on § 1447(c). *Id.* at 12a (citing *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), and *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124 (1995)). The court ruled, however, that a remand under SLUSA "is not within § 1447(c) or equivalent to it, for [it] comes at the end rather than the outset of federal adjudication." *Id.* at 13a. As the court noted, "[t]he Supreme Court has itself reviewed remand decisions that fall outside the scope of § 1447(c)." *Ibid.* (citing *Thermtron*; *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706 (1996); and *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343 (1988)).

The court of appeals rejected petitioners' contention that a SLUSA-based remand connotes a lack of subject-matter jurisdiction, and thus is governed by § 1447(c). "[T]he Supreme Court has observed that a court lacks 'subject-matter jurisdiction' only when Congress has not authorized the federal judiciary to resolve the sort of issue presented by the

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[Footnote continued from previous page]

state-law claims analogous to petitioners' are precluded by SLUSA. *In re Mut. Funds Inv. Litig.*, 384 F. Supp. 2d 845, 871-72 (D. Md. 2005). The Maryland court also held that certain federal claims—asserted by the same putative classes, and asserting the same alleged misconduct—could proceed, giving the lie to petitioners' assertion that "[p]ermitting the Seventh Circuit's ruling to stand would deprive the victims of market timing of any avenue of recourse in the state or federal courts." Pet. 30.

case (or the Constitution forbids adjudication)." Pet. App. 13a (citing *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), and *Scarborough* v. *Principi*, 541 U.S. 401 (2004)). Under SLUSA, "a federal judge is not only authorized but also required to decide whether any court may entertain the litigation," and "[a]fter making the decision required by [SLUSA], the district court had nothing else to do: dismissal and remand are the only options." *Id.* at 14a. To "say that jurisdiction evaporated at that juncture . . . would be tautological," the court explained, because "[o]therwise every federal suit, having been decided on the merits, would be dismissed 'for lack of jurisdiction' because the court's job was finished." *Ibid.* (citing *Bell* v. *Hood*, 327 U.S. 678 (1946)).

The Seventh Circuit "recognize[d] that two courts of appeals have held that disputes about the application of [SLUSA] cannot be resolved by federal appellate judges." Pet. App. 15a-16a (citing *Spielman* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116 (2d Cir. 2003); *United Investors Life Ins. Co.* v. *Waddell & Reed, Inc.*, 360 F.3d 960 (9th Cir. 2004); and *Abada* v. *Charles Schwab & Co.*, 300 F.3d 1112 (9th Cir. 2002)). These courts, the Seventh Circuit explained, failed to appreciate "the difference between a case that never should have been removed and a case properly removed and remanded only when the federal job is done." *Ibid.* Section 1447(d) does not preclude appellate review of cases in the latter category. *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992) ("we understand *Carnegie-Mellon* to permit review when the district judge believes that removal was proper and that later developments authorize remand"). The Seventh Circuit explained that it "could not follow the [S]econd and [N]inth [C]ircuits without overruling *Amoco Petroleum Additives*" and other Seventh Circuit precedent; but "[b]ecause *Amoco Petroleum Additives* has the support of at least three other [C]ircuits [the Fourth, Fifth, and Eleventh]—not to mention *Things Remembered* and *Quackenbush*—overruling would be inappropriate." Pet. App. 16a-17a. The opinion was circulated before release to all of the Circuit's active judges, none of whom "favored a hearing en banc." *Id.* at 17a.

b. In its second decision, the court of appeals (*Easterbrook*, Ripple and Wood, JJ.) concluded that petitioners' claims are precluded by SLUSA. Pet. App. 1a-9a. The court recognized that SLUSA's "in connection with" requirement was borrowed from § 10(b) of the Exchange Act and Rule 10b-5 thereunder because "SLUSA is designed to prevent plaintiffs from migrating to state court in order to evade rules for federal securities litigation in the Private Securities Litigation Reform Act of 1995" (PSLRA) and "SLUSA can do its job only if [it] covers those claims that engage Rule 10b-5 (and thus come within the [PSLRA]) if presented directly under federal law." Pet. App. 5a. The court noted that "[e]very court of appeals to encounter SLUSA has held that its language has the same scope as its antecedent in Rule 10b-5." Pet. App. 5a (citing *Dabit* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25 (2d Cir. 2005), *cert. granted*, No. 04-1371; *Rowinski* v. *Salomon Smith Barney Inc.*, 398 F.3d 294 (3d Cir. 2005); *Green* v. *Ameritrade, Inc.*, 279 F.3d 590 (8th Cir. 2002); *Falkowski* v. *Imation Corp.*, 309 F.3d 1123 (9th Cir. 2002); and *Riley* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334 (11th Cir. 2002)). "Unfortunately, however, the other circuits do not agree among themselves (or with the SEC) what Rule 10b-5 itself means. The phrase 'in connection with the purchase or sale' of a security is the sticking point." *Ibid.*

In *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), this Court held that persons who had not themselves purchased or sold securities could not maintain a private action for damages under Rule 10b-5. Petitioners "insist that any private action that is untenable after *Blue Chip Stamps* also is unaffected by SLUSA." Pet. App. 6a-7a. They sought to avoid SLUSA's preclusive reach by "fram[ing] complaints that avoid any allegations of purchase or sale"; instead, petitioners' class definitions included "investors who held shares of a given mutual fund between two specified dates." *Id.* at 6a.

The Seventh Circuit held that even "[a]ssuming that SLUSA's 'in connection with' language means 'able to pur-

sue a private right of action after *Blue Chip Stamps*,' . . . . [a]ll of these class actions must be dismissed." Pet. App. 6a. "As an effort to evade SLUSA," the court of appeals explained, "[petitioners'] class definition is a flop: some of the investors who held shares during the class period must have purchased their interest (or increased it) during that time; others, who owned shares at the beginning of the period, undoubtedly sold some or all of their investment during the window." *Ibid.* Indeed, because "[e]ach of the funds has substantial daily turnover," the court of appeals concluded that "the class of 'all holders' during even a single day contains many purchasers and sellers." *Ibid.* Thus, even if SLUSA incorporates a *Blue Chip Stamps*-type purchaser/seller limitation—that is, *even assuming the correctness of petitioners' construction of SLUSA*—the Seventh Circuit held that petitioners' state-law claims are precluded.

The Seventh Circuit recognized that securities plaintiffs could (and that one petitioner had attempted to) plead around petitioners' construction of SLUSA by "depicting the[] class[] as containing entirely non-traders." Pet. App. 8a. Because "*Blue Chip Stamps* would prevent such a private action from proceeding under Rule 10b-5," petitioners argued that SLUSA does not preclude such an action from proceeding under state law. *Id.* at 6a. The court of appeals disagreed.

The Seventh Circuit acknowledged that three Circuits—the Second (*Dabit*), Eighth (*Green*), and Eleventh (*Riley*)—had "equat[ed]" SLUSA's preclusive reach and the availability of a *private* right of action under Rule 10b-5. Pet. App. 7a. "The [N]inth [C]ircuit (*Falkowski*), by contrast, has written that coverage of SLUSA tracks the coverage of § 10(b) and Rule 10b-5 when enforced by *public* plaintiffs (the SEC or a criminal prosecutor)." *Ibid.* This view has also been articulated by the SEC, as *amicus curiae* in *Dabit*, both before the Second Circuit and in this Court.

"To say that SLUSA uses the same language as § 10(b) and Rule 10b-5," the court of appeals explained, "is pretty much to resolve the point." Pet. App. 7a. The public authorities may enforce the statute and regulation without prov-

ing that some governmental entity purchased or sold securities; "instead the 'in connection with' language ensures that the fraud occurs in securities transactions rather than some other activity." *Ibid.* (citing *SEC* v. *Zandford*, 535 U.S. 813 (2002), and *Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6 (1971)). "Decisions since *Blue Chip Stamps* reiterate that it deals with private actions alone and does not restrict coverage of the statute and regulation." *Id.* at 8a (citing *United States* v. *O'Hagan*, 521 U.S. 642 (1997); *Holmes* v. *SIPC*, 503 U.S. 258 (1992); and *United States* v. *Naftalin*, 441 U.S. 768 (1979)).

The court of appeals noted that "[i]t would be more than a little strange if the Supreme Court's decision [in *Blue Chip Stamps*] to block private litigation by non-traders became the opening by which that very litigation could be pursued under state law, despite the judgment of Congress (reflected in SLUSA) that securities class actions must proceed under federal securities law or not at all." Pet. App. 8a. SLUSA's "preemptive effect is not confined to knocking out state-law claims by investors who have *winning* federal claims, as [petitioners] suppose. It covers both good and bad securities claims—*especially* bad ones." Pet. App. 9a.

The court of appeals concluded that by attempting to limit their classes to exclude claims by purchasers and sellers of securities, "plaintiffs do not take their claims outside § 10(b) and Rule 10b-5; instead they demonstrate only that the claims must be left to public enforcement." Pet. App. 8a. Because the SEC could maintain an action based on the allegations in petitioners' complaints, the "in connection with" requirement is met and the claims are precluded by SLUSA. *Id.* at 8a-9a. "We hold that SLUSA is as broad as § 10(b) itself and that limitations on private rights of action to enforce § 10(b) and Rule 10b-5 do not open the door to litigation about securities transactions under state law." *Id.* at 9a.

DISCUSSION

Neither of the questions presented by petitioners warrants plenary review in this case.

Petitioners first question the propriety of the Seventh Circuit's acceptance of appellate jurisdiction. Although the decision below conflicts with decisions of the Second and Ninth Circuits, those decisions were rendered before this Court's decisions in *Kontrick* and *Scarborough*, on which the Seventh Circuit relied; the Second and Ninth Circuits could well reconsider their positions. Moreover, the jurisdictional issue is of diminished continuing importance, both because Congress has since made remand orders in non-securities class actions appealable (leaving securities actions subject to SLUSA) and because the Court's decision in *Dabit* will clarify the principal substantive issue that has led to confusion among the lower courts. And, in any event, the Seventh Circuit's jurisdictional decision is correct.

The second question presented by petitioners is the appropriate construction of SLUSA, specifically as regards so-called "holder" actions. The Court has agreed to provide such a construction in *Dabit*. Regardless of whether the Court affirms or reverses the Second Circuit in *Dabit*, this petition should be denied because the Seventh Circuit held that all petitioners allege misconduct in connection with their own purchases or sales of securities.

I. The Seventh Circuit's Exercise Of Appellate Jurisdiction Does Not Warrant Plenary Review

Respondents acknowledge that the decision below conflicts with the Second Circuit's decision in *Spielman* and the Ninth Circuit's decision in *Abada* (which was adhered to by the same court in *United Investors*). The Second and Ninth Circuits concluded that the remand of a case removed under SLUSA evidences a lack of subject matter jurisdiction in the federal courts within the meaning of 28 U.S.C. § 1447(c); the Seventh Circuit, by contrast, concluded that because Congress had expressly conferred jurisdiction on the federal courts to make a particular determination under SLUSA (*viz.*, whether the claim can proceed in any court), the district court's exercise of that jurisdiction in this case was reviewable on appeal. Notwithstanding the differing approaches

adopted by these courts, the jurisdictional issue does not warrant the Court's review at this time.

A. The Asserted Conflict Need Not Be Resolved At This Time

It is a commonplace that this Court does not grant certiorari to review *every* conflict among the courts of appeals. *See* Robert L. Stern et al., *Supreme Court Practice* § 4.4 at 226-28 (8th ed. 2002). Here, at least three factors militate against granting review of the jurisdictional question presented by petitioners.

1. Contrary to petitioners' contention (Pet. 21), there is no reason to believe that the Second and Ninth Circuits will not reconsider their position in light of the Seventh Circuit's decision. Neither court has examined the question since the decision below was announced, although the very existence of the decision below obviously gives litigants an incentive to raise the jurisdictional issue in future cases in the Second or Ninth Circuits. Those courts could well conclude that their earlier decisions were in error and that the Seventh Circuit's analysis is correct.

This is particularly so because, as the court below pointed out, the Second and Ninth Circuits relied on a reading of the term "jurisdiction" that is inconsistent with two later decisions of this Court—*Scarborough* and *Kontrick*. Although petitioners maintain that "there is no reason to expect *Scarborough* or *Kontrick* to affect the analysis of the Second and Ninth Circuits" (Pet. 21), the fact that these decisions clearly affected the analysis of not only the Seventh Circuit panel, but all the active judges of that court, gives every reason to expect that jurists on the Second and Ninth Circuits might similarly choose to give weight to this Court's pronouncements. *Cf. Disher* v. *Citigroup Global Mkts., Inc.*, 419 F.3d 649, 652 (7th Cir. 2005) (declining to revisit the jurisdictional issue).

Petitioners' principal rejoinder is that "the Eleventh Circuit determined that [SLUSA-based remand orders] are not reviewable after the Seventh Circuit had decided the oppo-

site." Pet. 21. But petitioners put more weight on *Williams* v. *AFC Enterprises, Inc.*, 389 F.3d 1185 (11th Cir. 2004), than it will bear. The state-court complaint in *Williams* alleged only violations of the Securities Act of 1933, and the Eleventh Circuit gave dispositive weight to pre-SLUSA circuit precedent holding that the 1933 Act's prohibition on removal (15 U.S.C. § 77v(a)) precluded appellate review of orders remanding claims brought under that statute. 389 F.3d at 1189-90 (relying on *Ariail Drug Co.* v. *Recomm Int'l Display*, 122 F.3d 930 (11th Cir. 1997), as "control[ling]" and "indistinguishable"). The Eleventh Circuit did not cite, or follow, the Second or Ninth Circuit decisions on which petitioners rely. Nor did the Eleventh Circuit cite the decision below, much less disagree with it. Petitioners thus wildly misstate the case when they claim that *Williams* "rejected the approach adopted by the Seventh Circuit and . . . agreed with the Second and Ninth Circuits." Pet. 2.[4]

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[4] In fact, *Williams* is entirely consistent with the decision below. In *Williams*, the state-court complaint asserted violations of *federal* law, but SLUSA preempts only class actions "based upon the statutory or common law of any State or subdivision thereof." 15 U.S.C. §§ 77p(b) & 78bb(f)(1). Since the complaint on its face did not present even a colorable SLUSA defense, the district court never had jurisdiction to adjudicate the federal issue. This conclusion was presaged by the decision below, where the Seventh Circuit reasoned that "[a] conclusion that a suit is not a 'covered class action' (say, because just 40 investors stand to recover damages [rather than the 50 or more required by SLUSA]) would imply that removal had been improper, and such a decision would come within § 1447(d)." Pet. App. 14a. By contrast, where a removing defendant presents a colorable defense under SLUSA—as respondents did here—the district court has jurisdiction to adjudicate that defense and its decision on the federal issue is subject to appellate review. *Ibid.* Nothing in *Williams* is to the contrary.

2. As petitioners acknowledge (Pet. 22 n.11), Congress recently made orders remanding most class actions to state court appealable. Section 5(a) of the Class Action Fairness Act of 2005 (CAFA) provides that "notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed." 119 Stat. 12 (codified at 28 U.S.C. § 1453(c)(1)). CAFA does not apply to securities actions, which remain subject to SLUSA.

Petitioners contend that "questions about the proper interpretation of SLUSA's preemption and removal provisions are no less important after passage of CAFA." Pet. 22 n.11. But whereas before CAFA petitioners might have made an argument that the decision below could lead to widespread appeals of remand orders, Congress has now legislated precisely that result. The court of appeals' decision to accept jurisdiction in this case therefore potentially affects only a fraction of all class action litigation in the federal courts, and it does so in a way that is entirely consistent with Congress's latest pronouncement on the subject. This significantly lessens the importance of the conflict asserted by petitioners. Moreover, Congress's willingness to legislate in this area, as evidenced most recently by CAFA, provides an alternative avenue of relief for those who disagree with the Seventh Circuit's construction of SLUSA.

3. In light of the foregoing considerations, the jurisdictional issue presented by petitioners would benefit from further percolation in the lower courts before being addressed, if necessary, by this Court. *See, e.g.*, *McCray* v. *New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied where issue requires "further study" in lower courts "before it is addressed by this Court"); *cf. Rowinski* v. *Salomon Smith Barney Inc.*, 398 F.3d 294, 298 n.2 (3d Cir. 2005) (noting the jurisdictional issue without weighing in on it).

Affording the lower courts the opportunity to grapple in the first instance with the appealability of SLUSA-related orders is especially appropriate because *Dabit* presents this

Court with its first occasion to authoritatively construe SLUSA since it was enacted in 1998. As petitioners point out, the jurisdictional issue could arise "in the entire range of cases in which plaintiffs successfully contest the applicability of SLUSA's preemption provision." Pet. 21. In *Dabit*, this Court will decide just what that "range of cases" encompasses. And once the Court has articulated the scope of SLUSA's preclusive reach, it is reasonable to expect another round of litigation in the lower federal courts. The *Dabit* decision, and any such follow-on litigation, could definitively resolve the jurisdictional question one way or the other.

If, for example, the *Dabit* Court were to adopt some variant of the Second Circuit's approach to SLUSA preclusion, securities plaintiffs would have further incentive to file in state court, which would lead to more removals and, presumably, additional attempts to appeal during which the asserted conflict would either be exacerbated or resolved. By contrast, if the *Dabit* Court were to agree with the Seventh Circuit that the *Blue Chip Stamps* purchaser/seller limitation is inapplicable to SLUSA, then most state-law class actions pertaining to securities would be preempted (as, we believe, Congress intended them to be) and the jurisdictional issue would be all but moot. To the extent the jurisdictional issue retains any practical significance following *Dabit*, there will be ample time, and opportunity, for the lower courts to resolve it in due course.[5]

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[5] Indeed, plenary review of the jurisdictional issue in this case could well be an exercise in futility. If petitioners were to prevail on the jurisdictional issue, this case would presumably be remanded; but on remand, respondents would move to dismiss under SLUSA (as construed in *Dabit*). Because the Seventh Circuit has already ruled that all petitioners' "claims depend on statements made or omitted in connection with *their own* purchases of the funds' securities" (Pet. App. 9a), petitioners' claims are precluded by SLUSA *regardless* of whether the Court affirms or reverses in *Dabit*.

[Footnote continued on next page]

B. The Decision Below Is Correct

Petitioners maintain that "[a] court's remand order based on a finding of no preemption [under SLUSA] is, for purposes of § 1447(d), no different from any other remand order based on a lack of federal-question jurisdiction following a defendant's removal of a case." Pet. 20. Petitioners are simply incorrect in equating a district court's adjudication of the SLUSA preclusion defense with an ordinary determination that a court lacks subject-matter jurisdiction. This is the fundamental point overlooked by the Second and Ninth Circuits, as the court below explained. Pet. App. 16a.

SLUSA's express removal provisions confer jurisdiction on the federal courts to adjudicate a discrete question of federal law (*i.e.*, whether the claims at issue can be maintained in any court). 15 U.S.C. §§ 77p(c) & 78bb(f)(2). "The express removal provisions of SLUSA are clearly sufficient to confer Article III 'arising under' jurisdiction." *Dudek* v. *Prudential Secs., Inc.*, 295 F.3d 875, 879 n.3 (8th Cir. 2002) (citing *Verlinden B.V.* v. *Central Bank of Nig.*, 461 U.S. 480, 494-97 (1983)). And it is well-established that Article III "'arising under' jurisdiction is broader than federal-question jurisdiction under § 1331." *Verlinden*, 461 U.S. at 495. In particular, "Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law" (*id.* at 492), including claims that involve only a federal defense. *Osborn* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738, 822 (1824) (it is "a sufficient

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See Part II.A., *infra*. Accordingly, the complaints in this case will be dismissed regardless of the outcome in *Dabit*—which is precisely the effect of the extant judgment of the court below. Because petitioners' situation would not change even if they could win on the jurisdictional question, there is no cause for this Court to answer it here.

foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction"). That is precisely what Congress did in SLUSA. Pet. App. 15a ("The district judge made a substantive decision under authority granted by a federal statute").

SLUSA is not the first time that "Congress has expressly provided by statute for removal when it desired federal courts to adjudicate defenses based on federal [law]." *Oklahoma Tax Comm'n* v. *Graham*, 489 U.S. 838, 841 (1989). Under the federal officer removal statute (28 U.S.C. § 1442), for example, "suits against federal officers may be removed despite the nonfederal cast of the complaint; the federal question element is met if the defense depends on federal law." *Jefferson County* v. *Acker*, 527 U.S. 423, 431 (1999). The statute provides that a suit against a federal officer may be removed to federal court if it involves "any act under color of such office" (28 U.S.C. § 1442(a)(1)), and has long been understood to authorize removal whenever the officer has a colorable defense (*i.e.*, that the challenged act was official)—not only when the court finds that the act *meets* the statutory requirement. "The officer need not win his case before he can have it removed." *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969). Rather, "[o]nce the federal defendant has a plausible federal defense, removal is appropriate so that the federal court may determine whether the defense succeeds." *Venezia* v. *Robinson*, 16 F.3d 209, 212 (7th Cir. 1994).

Petitioners insist, however, that because SLUSA's removal provision "cross-references" its preemption provision (*see* 15 U.S.C. § 78bb(f)(2)), Congress intended to authorize removal only of those cases that are actually preempted—that is, the defendant must win its case in order to remove it. Pet. 18; *see id.* at 11 (arguing that "only those actions preempted by SLUSA are subject to [removal]"). This Court rejected a strikingly similar argument in *Acker*, where it explained that "demanding an airtight case on the merits" in order to support removal "would defeat the purpose of the [federal officer] removal statute," which is to have the *federal* defense

adjudicated in *federal* court. 527 U.S. at 432 (citing *Willingham*, 395 U.S. at 407); *see also id.* at 447-48 (Scalia, J., dissenting). SLUSA similarly was intended to have the federal courts resolve the federal preclusion question, so long as the SLUSA defense is colorable. *Cf.* note 4, *supra*.

It follows that petitioners' argument that § 1447(d) precludes appellate review of an order adjudicating a colorable defense of SLUSA preclusion is quite wrong. "That the federal court ultimately rejects the federal defense that supported removal under [the federal officer statute] does not mean that it thereby loses subject matter jurisdiction over the removed action; the jurisdiction of the federal courts over a properly removed action will not be defeated by later developments in the suit." *Jamison* v. *Wiley*, 14 F.3d 222, 239 (4th Cir. 1994) (internal quotation omitted); *see also Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 434-35 (1995) (plurality opinion). The same analysis applies to SLUSA removals. The court of appeals held that "[t]his suit was properly removed." Pet. App. 15a.[6] It follows that the district court's subsequent rejection of respondents' defense of preclusion under SLUSA did not divest the court of jurisdiction, but rather constituted the exercise of jurisdiction. *Bell*, 327 U.S. at 682. The court below properly accepted appellate jurisdiction to review the district court's adjudication of the defense that Congress invested the federal courts with the authority to resolve.[7]

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[6] Although petitioners take issue with this case-specific conclusion (Pet. 18), it is clearly correct: Respondents had a colorable basis for invoking the jurisdiction of the federal court to decide their SLUSA defense, as the Seventh Circuit's subsequent decision dismissing petitioners' claims conclusively establishes. Pet. App. 9a.

[7] Indeed, this Court recognized long ago that a substantive decision that precedes, and even necessitates, a remand to state court is reviewable on appeal. *Waco* v. *United States Fid. & Guar. Co.*, 293 U.S. 140 (1934).

II. The Seventh Circuit's Construction Of SLUSA Does Not Warrant Plenary Review

The second question presented by petitioners essentially asks whether, as the court below concluded, "SLUSA is as broad as § 10(b) itself" (Pet. App. 9a), or rather, as petitioners contend, the purchaser/seller limitation devised by the Court in *Blue Chip Stamps* in the context of private Rule 10b-5 actions also serves to limit the preclusive reach of SLUSA. The Court will decide that precise question in *Dabit*. But because petitioners' claims are precluded by SLUSA under *either* construction, this petition should be denied.

A. The Asserted Conflict Will Be Resolved In *Dabit*

Dabit, like the decision below, held that the "meaning of 'in connection with' under SLUSA is coterminous with the meaning of the nearly identical language in § 10(b) of the Securities Exchange Act of 1934 . . . and its corresponding Rule 10b-5." 395 F.3d at 28. *Dabit* also held, consistent with the decision below, that the *Blue Chip Stamps* "limitation on standing to bring a private suit for damages for fraud in connection with the purchase or sale of securities [under Rule 10b-5] is unquestionably a distinct concept from the general statutory and regulatory prohibition on fraud in connection with the purchase or sale of securities [under § 10(b) and Rule 10b-5]." *Id.* at 39. *Dabit* recognized, for example, that the "the SEC or the United States may bring an enforcement action under [these provisions] so long as *someone* buys or sells the security during the period of allegedly fraudulent conduct." *Id.* at 37 (quotations omitted; emphasis added).

The Second Circuit in *Dabit*, however, proceeded from these correct, and universally accepted, premises to the *non sequitur*, and erroneous, conclusion that "the purchaser-seller rule of *Blue Chip Stamps* . . . applies as a limit on SLUSA's 'in connection with' requirement such that SLUSA does not preempt claims that do not allege purchases or sales made by

the plaintiff or the alleged class members." *Id.* at 28. The Seventh Circuit, by contrast, correctly concluded in the decision below "that SLUSA is as broad as § 10(b) itself and that limitations on private rights of action to enforce § 10(b) and Rule 10b-5 do not open the door to litigation about securities transactions under state law." Pet. App. 9a.

This Court has already granted certiorari in *Dabit* to resolve the asserted conflict between the Second and Seventh Circuits. As framed in the *Dabit* petition (at i), the question presented is:

> Whether, as the Seventh Circuit held earlier this month and in direct conflict with the decision below, SLUSA preempts state law class action claims based upon allegedly fraudulent statements or omissions brought solely on behalf of persons who were induced thereby to hold or retain (and not purchase or sell) securities?

The Court's resolution of this question in *Dabit* will necessarily answer the second question presented by petitioners here—*viz.*, whether "SLUSA preempts claims brought by holders of securities." Pet. i.

Petitioners do not contend that their second question warrants plenary review independently of—or even concurrently with—the Court's consideration of *Dabit*. To the contrary, they argue only that the Court should "hold the petition pending resolution of *Dabit*." Pet. 30. Respondents agree that this petition should be held pending *Dabit*. Once *Dabit* is decided, however, this petition should be denied.

This petition should plainly be denied if the Court were to reverse the Second Circuit's decision in *Dabit* and agree with the Seventh Circuit that the *Blue Chip Stamps* purchaser/seller standing limitation on private rights of action does not limit the preclusive reach of SLUSA. Petitioners' allegations meet the statutory "in connection with" require-

ment as elucidated in cases such as *Zandford*, and petitioners do not even attempt to argue otherwise.[8]

If the Court were to affirm the Second Circuit's decision in *Dabit*, then this petition should also be denied. The Seventh Circuit ruled that petitioners' claims are precluded *even under* the construction of SLUSA advanced by the respondent in *Dabit*—*i.e.*, even applying the purchaser/seller limitation to limit the scope of SLUSA preclusion. Pet. App. 6a. Although petitioners profess to "believe that this ruling is incorrect" (Pet. 12 n.9), they have not even asked this Court to review this fact-bound ruling, which clearly does not warrant plenary consideration. It is dispositive as to all of the complaints but one. Petitioners seek solace in the fact that one complaint "defined a class of holders without claims under Rule 10b-5" (*ibid.*), ignoring the Seventh Circuit's subsequent ruling that *all* petitioners' "claims depend on statements made or omitted in connection with *their own* purchases of the funds' securities." *Id.* at 9a. This ruling, which petitioners do not challenge, brings the case within SLUSA's preclusive scope even under the construction advanced by the respondent in *Dabit*. Accordingly, this petition should be denied regardless of whether the Second Circuit's decision in *Dabit* is affirmed or reversed.[9]

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[8] Petitioners' suggestion that they have not alleged the kind of misconduct addressed by SLUSA (Pet. 30) is not encompassed by petitioners' second question, and thus is not properly presented. *See, e.g.*, *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *United States Philips Corp.*, 510 U.S. 27, 34 (1993). Moreover, because it was not presented to or passed on by the court of appeals (Pet. App. 6a), this Court should decline to consider it. *See, e.g.*, *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992).

[9] In the event the Court has any question as to the applicability of its decision in *Dabit* to the facts here, then the appropriate course would be to grant the petition, vacate the

[Footnote continued on next page]

B. The Decision Below Is Correct

Because the Seventh Circuit ruled that all petitioners' "claims depend on statements made or omitted in connection with *their own* purchases of the funds' securities" (Pet. App. 9a), the complaints in this case must be dismissed even under the construction of SLUSA advanced by the respondent in *Dabit*. This case therefore does not present an appropriate vehicle for determining whether some other action, in which the class members' claims do not depend on allegations of misconduct in connection with their own purchases or sales of securities, might be precluded.

Moreover, the Seventh Circuit's conclusion that the *Blue Chip Stamps* purchaser/seller standing limitation does not limit the scope of SLUSA preclusion is correct. Petitioners maintain that it is wrong because "the purchaser-seller rule is . . . an interpretation of the 'in connection with' phrase." Pet. 28. But as Justice O'Connor succinctly put it, "[t]he purchaser/seller standing limitation in Rule 10b-5 damages actions . . . does not stem from a construction of the phrase 'in connection with the purchase or sale of any security.'" *Holmes*, 503 U.S. at 284 (concurring opinion). Petitioners' contrary argument simply cannot be reconciled with *O'Hagan* (decided the year before SLUSA's enactment) or *Zandford*, which make clear that the purchaser/seller limitation does *not* apply to criminal prosecutions or administrative enforcement actions under § 10(b), as to which the "in connection with" requirement remains an element of the offense on which the government bears the burden of proof. *See O'Hagan*, 521 U.S. at 665 (*Blue Chip Stamps* "is 'inapplicable' to indictments for violations of § 10(b) and Rule 10b-5"). SLUSA's preclusive reach is, as Judge Easterbrook cor-

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decision below, and remand for further proceedings in the court of appeals consistent with *Dabit*.

rectly recognized in the decision below, "as broad as § 10(b) itself" (Pet. App. 9a); and it is certainly broad enough to preclude petitioners' claims.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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November 29, 2005.

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[10] The correctness of the decision below is further demonstrated in the briefs filed by the petitioner, and the *amici curiae* supporting petitioner, in *Dabit*.

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APPENDIX

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-692

ROBERT POTTER and DOROTHY LEUTTINGER, individually and on behalf of all others situated,

Plaintiffs,

vs.

JANUS INVESTMENT FUND, a business trust, JANUS CAPITAL MANAGEMENT, LLC, SCUDDER INTERNATIONAL FUND, INC. a corporation and DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC.,

Defendants.

[Filed September 16, 2003]

COMPLAINT

COME NOW Plaintiffs, ROBERT POTTER and DOROTHY LEUTTINGER, individually and on behalf of all others similarly situated, by and through their undersigned counsel, and for their complaint against Defendants, JANUS INVESTMENT FUND, JANUS CAPITAL MANAGEMENT, LLC, SCUDDER INTERNATIONAL FUND, INC., and DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC., state as follows:

1. Plaintiff ROBERT POTTER is a resident of Edwardsville, Madison County, Illinois.

2. Plaintiff DOROTHY LEUTTINGER is a resident of Trenton, Clinton County, Illinois.

3. Defendant JANUS INVESTMENT FUND ("Janus Funds") is a Massachusetts business trust with its principal place of business in Denver, Colorado. Janus Funds is the sponsor of the Janus Overseas Fund ("Janus Overseas"). Defendant Janus Funds does business in the state of Illinois and is registered as a mutual fund in the state of Illinois. Defendant Janus Funds has consented to the jurisdiction of Illinois courts. Defendant JANUS FUNDS at all times relevant herein has promoted, marketed, and sold shares to the investing public nationwide including the state of Illinois. Defendant JANUS FUNDS maintains investor relationships nationwide including with shareholders in the state of Illinois. Defendant JANUS FUNDS has significant contacts with Madison County and the activities complained of herein occurred, in whole or part, in Madison County, Illinois.

4. Defendant JANUS CAPITAL MANAGMENT LLC ("JANUS FUNDS MANAGER") is a Delaware limited liability company with its principal place of business in Denver, Colorado. The day-to-day tasks associated with running the business of Janus Oversees Fund, such as investment management, share marketing, distribution, redemption, financial and regulatory reporting, and custodianship of fluids are contracted out since it has no significant number of internal employees. Defendant JANUS FUNDS MANAGER has been contracted to serve as the investment manager for the Janus Overseas Fund. As the investment manager for Janus Overseas Fund, Defendant JANUS FUNDS MANAGER selects the fund's investments and operates or supervises most phases of the fund's business including the valuing of the fund's portfolio securities and the fund net asset value. Defendant JANUS FUNDS MANAGER has significant contacts with fund shareholders in Madison County as a result of its operation and supervision of Janus Overseas Fund business and the activities complained of herein occurred, in whole or in part, in Madison County, Illinois. Defendant JANUS FUNDS MANAGER utilizes an interactive website to

communicate with fund shareholders, including those in Madison County, Illinois, regarding the performance of the Fund and the investments it manages.

5. Defendant SCUDDER INTERNATIONAL FUND, INC. ("SCUDDER FUNDS") is a Maryland corporation with its principal place of business in New York, New York. SCUDDER FUNDS is the sponsor of the Scudder International Fund ("Scudder International"). Defendant SCUDDER FUNDS does business in the state of Illinois and is registered as a mutual fund in the state of Illinois. Defendant SCUDDER FUNDS has consented to the jurisdiction of Illinois courts. Defendant SCUDDER FUNDS at all times relevant herein has promoted, marketed, and sold shares to the investing public nationwide including the state of Illinois. Defendant SCUDDER FUNDS maintains investor relationships nationwide including with shareholders in the state of Illinois. Defendant SCUDDER FUNDS has significant contacts with Madison County, and the activities complained of herein occurred, in whole or part, in Madison County, Illinois.

6. Defendant DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC. ("SCUDDER FUND MANAGER") is a Delaware corporation with its principal place of business inNew York, New York. The day-to-day tasks associated with running the business of Scudder International, such as investment management, share marketing, distribution, redemption, financial and regulatory reporting, and custodianship of funds, are contracted out since it has no significant number of internal employees. Defendant SCUDDER FUND MANAGER has been contracted to serve as the investment manager for Scudder International. As the investment manager for Scudder International, Defendant SCUDDER FUND MANAGER selects the fund's investments and operates or supervises most phases of the fund's business including the valuing of the fund's portfolio securities and the fund net asset value. Defendant SCUDDER FUND MANAGER has significant contacts with fund shareholders in Madison County as a result of its operation and supervision of Scudder International business and the activities complained of herein occurred, in whole or

in part, in Madison County, Illinois. Defendant SCUDDER FUND MANAGER utilizes an interactive website to communicate with fund shareholders, including those in Madison County, Illinois regarding the performance of the Fund and the investments it manages.

7. At all tunes relevant herein, Plaintiff ROBERT POTTER has owned and held shares of Janus Overseas for the purpose of long term investing in international securities.

8. At all times relevant herein, Plaintiff DOROTHY LEUTTINGER has owned and held shares of Scudder International for the purpose of long term investing in international securities.

9. This Court has jurisdiction over the subject matter and the parties pursuant to 735 ILCS 5/2-209.

10. Venue is proper in this Court pursuant to 735 ILCS 5/2-101.

11. The foreign securities purchased by Defendants' Funds for their portfolios are principally traded in securities markets outside of the United States.

12. Open end mutual funds such as Defendants' Funds have been tremendously successful in convincing investors such as Plaintiffs' to hold their fund shares by urging investors to invest for the long term and by effectively marketing the various advantages of long term ownership of funds over direct investment including professional management, diversification, and liquidity.

13. Shares of open end mutual funds are sold to investors such as Plaintiffs at a price based upon the net asset value ("NAV") per share plus applicable sales charges. Investors in shares may redeem their shares at the NAV of the shares less any redemption charges.

14. The share prices (NAV) of Defendants' mutual funds are set by deducting the fund liabilities from the total assets of the portfolio and then dividing by the number of outstanding shares.

15. Because the sales and redemption prices are based upon NAV,which in turn depends upon the fluctuating value of the fund's underlying portfolio of securities, Defendants recalculate the fund net asset value every business day. Defendants set the fund share price (NAV) once every business day at the close of trading on the New York Stock Exchange at 4:00 p.m. Eastern Time. The NAV of the shares is reported by Defendants to the National Association of Securities Dealers (NASD) for public distribution.

16. In valuing its underlying assets for purposes of setting the NAV, Defendants use the last trade price in the home market of each of the securities in its portfolio. A significant portion of the securities in the Defendants' portfolios are foreign securities, The home markets for such foreign securities include London, Paris, Frankfurt, Moscow, Singapore, Kuala Lumpur, Hong Kong, Taipei, Tokyo and Sydney. These markets are located in time zones that are five hours to fifteen hours ahead of Eastern Standard Time.

17. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and Europe markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the closing prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, the positive correlation and the stale price of the foreign securities in its underlying

portfolio. Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

18. The positive correlation between the upward or downward movement of value in the United States market and subsequent movements in foreign markets around the world is between 0.7 and 0.8. A value of 0.0 equates to absolutely no correlation between value movements in United States markets and subsequent movements in foreign markets. A value of 1.0 equates to an absolute correlation between value movements in United States markets and subsequent value movements in foreign markets.

19. Studies of world financial markets demonstrate that the greater the percentage increase or decrease in the value of United States markets, the more likely foreign markets will post corresponding value movements on subsequent days. The probability that the value movements of foreign markets will follow the previous day's value movements in United States markets is directly correlated with the degree or extent of the value movement of United States markets.

20. Since many of the home markets for the foreign securities in the Defendants' asset portfolio last traded hours before the setting at 4:00 p.m. Eastern of the fund NAV, the closing prices used to calculate the NAV of Defendants' funds are stale and do not reflect price relevant information available subsequent to the foreign security's last trade that will affect the value of such security.

21. During the interval that elapses between the time that Defendants got their share NAV (and release it to the NASD for communication to the public) on consecutive days, the securities markets in Australia, Japan, Taiwan, Hong Kong, Malaysia, Singapore, Russia, Germany, France and the United Kingdom have traded for an entire session from open to close.

22. The exchange located in Sydney, Australia observes normal market trading hours of 10:00 a.m to 4:00 p.m. local time. Active trading of securities traded on this exchange

ends, and closing prices for those securities are posted, at 4:00 p.m local time (2:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14 hours.

23. The exchange located in Tokyo, Japan observes normal trading hours of 9:00 a m. to 3.00 p.m. local time. Active trading of securities traded un this exchange ends, and closing prices for those securities are posted, at 3:00 p.m. local time (2:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14 hours.

24. The exchange located in Taipei, Taiwan observes normal trading hours of 9:00 a.m. to 1:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 1:30 p.m. local time (1:30 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14.5 hours.

25. The exchange located in Hong Kong observes normal trading hours of 10:00 a.m. to 4:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 4:00 p.m. local time (4:00 a.m. Eastern time). When Defendants calculate its fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 12 hours.

26. The exchange located in Kuala Lumpur, Malaysia observes normal trading hours of 9:30 a.m. to 5:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 5:00 p.m. local time (5:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for

securities traded on this exchange that have been static for 11 hours.

27. The exchange located in Singapore observes normal trading hours of 9:00 a.m. to 5:00 p.m. local tune. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 5:00 p.m. local time (5:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 11 hours.

28. The exchange located in Moscow, Russia observes normal trading hours of 12:00 p.m to 7:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 7:00 p.m. local time (11:00 a.m. Eastern time). When Defendants calculate their fund NAV, using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 5 hours.

29. The exchange located in Frankfurt, Germany observes normal trading hours of 9:00 a.m. to 8:00 p.m., local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 8:00 p.m. local time (2:00 p.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 2 hours.

30. The exchange located in Paris, France observes normal trading hours of 9:00 a.m. to 5:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted at, 5:30 p.m. local time (11:30 a.m. Eastern time). When Defendants calculate their fund NAV, using closing prices from this exchange Defendants rely upon closing prices for securities traded on this exchange that have been static for 4.5 hours.

31. The exchange located in London, England observes normal market hours of 8:00 a.m. to 4:30 p.m. local time.

Active trading of securities traded on this exchange ends, and closing prices for those securities are posted at 4:30 p.m. local time (11:30 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 4.5 hours.

32. A significant portion of the underlying foreign securities in the Defendants' portfolios are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Such price relevant information impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

33. By failing to make its daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlation between value movements in United States markets and foreign markets. The stale price strategy of market timers who trade Defendants' shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on

any particular business day. Because Defendants cannot buy or sell the foreign securities in the funds' underlying portfolio (due to the time difference between New York and the home markets of the foreign securit. s) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

34. Due to the use of stale prices by Defendants in valuing the fund shares, market timers who buy Defendants' funds' shares on days when the United States market moves up are buying discounted shares at the expense of other fund shareholders because the funds underlying foreign securities assets are undervalued as of the time of the share purchase.

35. Due to the use of stale prices by Defendants in valuing their fund shares, market timers who sell (redeem) Defendants' shares on days when the United States market moves down are selling (redeeming) shares at a premium at the expense of other fund shareholders because the underlying foreign securities assets are overvalued as of the time of the share sale (redemption).

36. Shares in Defendants' funds can be traded, either by purchase or redemption, only once a day at 4:00 p.m. Eastern Time.

37. The excess profits that are obtained by market timing traders' taking advantage of the stale pricing of Defendants' shares come at the expense of fellow shareholders who are non-trading long term buy and hold investors. The transfer of wealth from the non-trading long term buy and hold shareholders to the market timers trading Defendants shares in Defendants' funds occurs through dilution.

38. Market timing traders pay cash to Defendants funds when they purchase discounted shares. Market timing traders receive cash from Defendants funds when they sell (redeem) their shares at a premium. Defendants' fund NAV is diluted in both instances. When market timing traders are

able to buy shares at a discount, Defendants' fund assets suffer dilution because the cash received by the fund for the shares purchased is less than the per share value of the underlying foreign securities because of the stale pricing utilized by Defendents. Likewise, when market timing traders are able to sell (redeem) shares at a premium, Defendants' fund assets suffer dilution because the cash paid out by the fund for the shares redeemed is more than the per share value of the underlying securities, again due to the stale pricing utilized by Defendants. In both instances, when Defendants receive less cash when issuing and pay out more cash when redeeming market timing trader shares than supported by the value of their underlying foreign securities, the result is a dilution of Defendants' cash. Since the cash held by the fund is one of the assets that is valued in setting the Defendant's daily fund NAV, it follows that the diluted fund cash position causes the fund NAV to be diluted as well. Due to the stale pricing utilized by Defendants, long term buy and hold shareholders have incurred a dilution in the NAV of their shares and the wealth represented by that diluted amount has been transferred to market timing traders.

39. By failing to make daily adjustments based upon positive correlations between upward movements in United States and foreign markets and by choosing to use stale prices in valuing the underlying foreign securities that are used setting their daily NAV, Defendants give market timing traders the opportunity to earn vastly higher returns at no additional risk. Unlike other market timing based trading, market timers who trade Defendants shares do not have to look into the future to time their purchases and redemptions of shares, rather, they have the luxury of being able to look backwards because, Defendants' share pricing fails to adjust for recognized positive correlations and uses stale prices in valuing its underlying portfolio securities.

40. Since it is such an attractive low risk trading vehicle to market timers, Defendants' funds experience increased trading and transaction costs, disruption of planned investment strategies, forced and unplanned portfolio

turnover including the liquidation of investments to meet market timer redemption requests, lost opportunity costs and asset swings that negatively impact fund operations and performance and the ability of the fund to provide a maximized return to long term shareholders.

41. Plaintiffs bring this complaint as a class action against Defendants JANUS FUNDS, JANUS FUNDS MANAGER, SCUDDER FUNDS and SCUDDER FUNDS MANAGER, and pursuant to § 5/2-801 et. seq., of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have owned shares in Janus Overseas or Scudder International for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long term shareholders"). The class period commences five years prior to the filing of this complaint. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family member of any such person. Also excluded is any judge who may preside over this case.

42. Plaintiffs are members of the class and will fairly and adequately assert and protect the interests of the class. The interests of the Plaintiffs are coincident with, and not antagonistic to, those of other members of the class. Plaintiffs have retained attorneys who are experienced in class action litigation.

43. Members of the class are so numerous that joinder of all members is impracticable.

44. Common questions of law or fact predominate over any questions affecting only individual members of the Class. Common questions include, but are not limited to, the following:

i. whether defendants failed to properly evaluate on a daily basis whether a significant event affecting the value of Janus Overseas and Scudder International's and portfolio of securities had

occurred after the foreign home markets for such securities had closed but before the fund's NAV calculation and share price setting;

ii. whether defendants failed to properly implement laws Overseas and Scudder International's portfolios valuation and share pricing policies and procedures making daily adjustments based upon United States market results and recognized positive correlations between upward movements in United States and foreign markets in the valuation of the fund's portfolio securities prior to the calculation of the fund NAV and setting of the share price;

iii. whether defendants failed to properly implement Janus Overseas and Scudder International's portfolio valuation and share pricing policies and procedures making daily adjustments to stale closing prices of the underlying portfolio securities before the fund's NAV calculation and share price setting;

iv. whether defendants failed to properly implement Janus Overseas and Scudder International's portfolio valuation and share pricing policies so as to require the use of fair value pricing on a daily basis to value portfolio securities and fund NAV and share prices when closing prices of portfolio securities did not reflect their market values;

v. whether Defendants failed to protect Janus Overseas and Scudder International's long term shareholders from market timing traders of fluid shares who use Janus Overseas and Scudder International's shares as a trading vehicle to earn profits at the expense of long term shareholders because of the failure of Janus Funds, Janus Funds Manager, Scudder Funds, and Scudder Fund Manager to make daily adjustments, based

upon known United States market results and recognized positive correlation between upward movements in United States and foreign markets, prior to the daily calculation of the fund NAV and the netting of share prices as well as their use of stale prices in the valuation of the fund's portfolio securities prior to the daily calculation of the fund NAV and the setting of share prices;

vi. whether defendants breached the duties they owed to plaintiffs and the class;

vii. whether plaintiffs and the class have been damaged and, if so,

viii. the extent of such damages.

45. The prosecution of separate actions by individual members of the Class would create a risk of:

i. inconsistent or varying adjudications with respect to individual members of the class; and

ii. adjudication with respect to individual members of the class, which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interest.

46. The class action method is appropriate for the fair and efficient prosecution of this action.

47. Individual litigation of all claims, which might be brought by all class members would produce a multiplicity of cases so that the judicial system would be congested for years. Class treatment, by contrast, provides manageable judicial treatment calculated to bring a rapid conclusion to all litigation of all claims arising from the conduct of the defendants.

48. The certification of a class would allow litigation of claims that, in view of the expense of the litigation, may be insufficient in amount to support separate actions.

Count I

COMES NOW Plaintiff, ROBERT POTTER, individually and on behalf of all others similarly situation, by and through his undersigned counsel, and for Count I of his complaint against Defendants JANUS FUNDS and JANUS FUNDS MANAGER, states as follows:

49. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 as if fully set forth herein.

50. Defendant JANUS FUNDS operates Janus Overseas as an open end mutual fund with the stated goal of providing long term capital growth to investors who hold shares of the fund. The fund expressly states in its prospectus that it seeks to achieve its investment goal through a policy of investing in stocks and debt obligations of companies outside of the United States.

51. Defendant JANUS FUNDS MANAGER serves as the investment manager for Janus Overseas. Defendant JANUS FUNDS MANAGER provides, among other things, portfolio management services and selects the securities for Janus Overseas to buy, hold or sell. Janus Overseas pays Defendant JANUS FUNDS MANAGER set fees based on the percentage of assets under management for managing Janus Overseas' assets. Defendant JANUS FUNDS MANAGER's compensation and management of the Janus Overseas Fund are required to be reviewed and approved by Defendant Janus Fund's board of trustees.

52. At all times relevant hereto, Plaintiff POTTER has owned shares in Janus Overseas.

53. In undertaking their role as investment managers with respect to the Funds, Defendants directly or impliedly hold themselves out as skilled specialists in the field of investment management, possessing the knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

54. It thereby became the duty of Defendants to exercise that degree of knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

55. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities represented in the Janus Overseas Fund and used by Defendants to calculate NAV for said Fund did not represent fair value because, inter alia, those prices did not reflect changes in trading prices as a result of trading which Defendants knew, or were negligent in not knowing, occurred daily after the closing of the New York Stock Exchange.

56. Defendants breached their duties of due care owed to Plaintiff Potter and similarly situated owners of the Janus Overseas Fund by, inter alia:

i. failing to properly evaluate on a daily basis whether a significant event affecting the value of Janus Overseas' portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

ii. failing to implement Janus Overseas' portfolio valuation and share pricing policies and procedures; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Janus Overseas shares' at the expense of long term shareholders.

57. As a direct and proximate result of the Defendants' breach of their duties, Plaintiff Potter and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against defendants

JANUS INVESTMENT FUND and JANUS CAPITAL MANAGEMENT LLC, as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the Janus Overseas Fund or Scudder International Fund for a period of more than fourteen days before redeeming or exchanging them during the period beginning five years prior to the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

Count II

COMES NOW Plaintiff, ROBERT POTTER, individually and on behalf of all others similarly situation, by and through his undersigned counsel, and for Count II of his Complaint against Defendants JANUS FUNDS and JANUS FUNDS MANAGER, states as follows:

58. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 and 50 through 55 as if fully set forth herein.

59. On or about January 1, 1965, applicable published regulations expressly recognized that changes in trading prices of securities in the Janus Overseas Fund might occur daily after the closing of the New York Stock Exchange

60. With utter indifference and conscious disregard for Plaintiff POTTER'S investment and the investments of similarly situated fund owners, Defendants willfully and wantonly breached their duties to Plaintiff POTTER and similarly situated owners by, inter alia:

i failing to know and implement applicable rules and regulations concerning the calculation of NAV;

ii. failing to properly evaluate on a daily basis whether a significant event affecting the value of Janus Overseas' portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

iii. failing to implement Janus Overseas' portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefited market timing trader of Janus Overseas' shares at the expense of long term shareholders.

61. As a direct and proximate result of the Defendants' breach of their duties, Plaintiff Potter and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against Defendants JANUS INVESTMENT FUNDS and JANUS CAPITAL MANAGEMENT LLC, as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the Janus Overseas Fund or Scudder International Fund for a period of more than fourteen days before redeeming or exchanging there from the period beginning five years prior to the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

Count III

COMES NOW Plaintiff, DOROTHY LEUTTINGER, individually and on behalf of all others similarly situated, by and through her undersigned counsel, and for Count III of her Complaint against Defendants SCUDDER FUNDS and SCUDDER FUND MANAGER, states as follows:

62. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 as if fully set forth herein.

63. Defendant SCUDDER FUNDS operates Scudder International Fund as an open end mutual fund with the stated goal of providing long term capital growth to investors who hold shares of the fund. The fund expressly states in its prospectus that it seeks to achieve its investment goal through a policy of investing in stocks and debt obligations of companies outside of the United States.

64. Defendant SCUDDER FUND MANAGER serves as the investment manager for Scudder International. Defendant SCUDDER FUND MANAGER provides, among other things, portfolio management services and selects the securities for Scudder International to buy, hold or sell. Scudder International pays Defendant SCUDDER FUND MANAGER set fees based on the percentage of assets under management for managing Scudder International's assets. Defendant SCUDDER FUND MANAGER's compensation and management of the Scudder International Fund are required to be reviewed and approved by Defendant Scudder Funds' board of directors.

65. At all times relevant hereto, plaintiff LEUTTINGER has owned shares in Scudder International.

66. In undertaking their role as investment managers with respect to the Funds, Defendants directly or impliedly held themselves out as skilled specialists in the field of investment management, possessing the knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

67. It thereby became the duty of Defendants to exercise that degree of knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

68. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities represented in the Scudder International Fund and used by Defendants to calculate NAV for said Fund did not represent fair value because, inter alia, those prices did not reflect changes in trading prices as a result of trading which Defendants knew, or were negligent in not knowing, occurred daily after the closing of the New York Stock Exchange.

69. Defendants breached their duties of due care owed to Plainntiff LEUTTINGER and similarly situated owners of the Scudder International Fund by, inter alia:

i. failing to properly evaluate on a daily basis whether a significant event affecting the value of Scudder International's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

ii. failing to implement Scudder International's portfolio valuation and share pricing policies and procedures; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Scudder International's shares at the expense of long term shareholders.

70. As a direct and proximate result of the Defendants' breach of their duties, plaintiff LEUTTINGER and the class have suffered damages in the amount to be proven at trial,

but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against Defendants SCUDDER INTERNATIONAL FUND, INC. and DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC., as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the Janus Overseas Fund or Scudder International Fund for a period of more than fourteen days before redeeming or exchanging them during the period beginning five years prior to the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

Count IV

COMES NOW Plaintiff, DOROTHY LEUTTINGER, individually and on behalf of all others similarly situated, by and through her undersigned counsel, and for Count IV of her Complaint against Defendants SCUDDER FUNDS and SCUDDER FUND MANAGER, states as follows:

71. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 and 63 through 68 as if fully set forth herein.

72. On or about January 1, 1965, applicable published regulations expressly recognized that changes in trading prices of securities in the Scudder International Fund might

occur daily after the closing of the New York Stock Exchange.

73. With utter indifference and conscious disregard for Plaintiff's investment and the investments of similarly situated fund owners, Defendants willfully and wantonly breached their duties to Plaintiff Leuttinger and similarly situated owners by, inter alia:

i. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

ii. failing to properly evaluate on a daily basis whether a significant event affecting the value of Scudder International's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

iii. failing to implement Scudder Intemational's portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share priciug policies, and procedures which benefitted market timing traders of Scudder International's shares at the expense of long term shareholders.

74. As a direct and proximate result of the Defendants' breach of their duties. Plaintiff Leuttinger and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against Defendants SCUDDER INTERNATIONAL FUND, INC. and DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC., as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the Janus Overseas Fund or Scudder International Fund for a period of more than fourteen days before redeeming or exchanging them during the period beginning five years prior to the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

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